MINUTES

Advisory Committee on Model Civil Jury Instructions
September 14, 2009
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, David E. West, and Kent B. Scott (chair of the Construction Contract subcommittee)

1. *Construction Contract Instructions*. The committee continued its review of the construction contract instructions.

a. *CV2207. Contractor's duty to inquire about or investigate specific information provided by owner*. Mr. Humpherys questioned whether jurors would understand "representation" and suggested that "statement" be used instead. Dr. Di Paolo asked whether all representations are statements or whether a schematic, for example, could be a representation. The committee revised the instruction to read:

> [Name of contractor] claims that [name of owner] made the following incorrect representations: [describe the representations].
>
> [Name of contractor] claims [he] is entitled to damages caused by relying on incorrect representations.
>
> [Name of owner], however, claims [he] is not liable for [name of contractor]'s damages because [name of contractor] should have investigated or inquired about the representations before submitting a proposal.
>
> In order for [name of contractor] to establish that there was no obligation to investigate or inquire about each representation, [name of contractor] must prove that:
>
> (1) the representations were incorrect;
>
> (2) [he] conducted a reasonable [inspection/inquiry] of the proposed work site and bid documents to confirm their accuracy before submitting a proposal;
>
> (3) [he] should not have reasonably been expected to recognize that the representation was incorrect; and
>
> (4) [name of owner] did not warn [name of contractor] that the representations may not be reliable and may require further investigation or inquiry.

Mr. Shea asked whether "investigate or inquire" were the same thing. Dr. Di Paolo and Mr. Scott said no (both from a linguistic perspective and a legal perspective). Mr. Fowler asked whether it should be "investigate and inquire." Dr. Di Paolo suggested saying "investigate and/or inquire." Mr. Young suggested adding a committee note to explain that a contractor does not have to both

investigate and inquire in every case. At Mr. Shea's suggestion, the instruction was changed to read "to investigate or inquire about each representation." The committee approved the instruction as modified. Mr. Fowler noted that the *Jack B. Parson* case cited as authority for the instruction is listed as a 1996 case in CV2207 and as a 1986 case in CV2206. Mr. Shea will correct the incorrect citation.

b. *CV2216. Duty to provide access to the worksite.* Mr. Young noted that the instruction, which had previously been approved, was revised to cover cases of delay as well as those involving additional cost. At Mr. Young's suggestion, the terms *he* and *his* in subparagraphs (1) through (3) were changed to *[Name of contractor]['s].* The committee approved the instruction as modified.

c. *CV2218. Contractor's liability for defective work.* Messrs. Young and Scott agreed that this instruction can be deleted.

d. *CV2225. Cardinal changes.* The phrase "contemplated by the original contract" in the first paragraph was changed to "described by the original contract." Dr. Di Paolo and Mr. Humpherys asked whether the term *abandoned* in subparagraph (3) needed to be defined or explained. Mr. Ferguson noted that it is defined in CV2134, a commercial contract instruction. Messrs. Scott and Humpherys questioned whether subparagraph (3) was even necessary. Messrs. Humpherys and Ferguson asked how the concept was different from a novation or an accord and satisfaction. Mr. Shea thought that whether the contract could be considered abandoned was a conclusion for the jury to draw. Mr. Humpherys noted that the original contract is not completely abandoned; it still exists; it is just not controlling. The committee revised subparagraph (3) to read, "the parties acted as if the contract no longer applied." The committee approved CV2225 as revised.

e. *CV2226. Excusable delay; contractor's claim for time.* Several committee members found the instruction confusing and asked how the issue would arise. Mr. Young noted that a claim of excusable delay may be either a claim or an affirmative defense but most often arises as a defense to a claim by the owner for liquidated damages. Mr. Scott explained that, depending on the reasons for a delay, the contractor may be entitled to (1) additional time to complete the contract; (2) additional time and money; or (3) no additional time or money. Mr. Nebeker asked whether an award of additional time automatically meant that the contractor was also entitled to additional money. Messrs. Scott and Young said no. The committee revised the instruction to read:

> [Name of contractor] claims that he was entitled to more time to perform the work because of an excusable delay. To succeed on this claim, [name of contractor] must prove that the events causing the delay:
>
> (1) were beyond [name of contractor]'s control;
>
> (2) were not reasonably foreseeable by [name of contractor] at the time the contract was made;
>
> (3) prevented [name of contractor] from meeting the contract deadline.

Subparagraph (4) (that the contractor did not waive or assume the delay) was deleted, on the grounds that it was an affirmative defense to the claim. The title of the instruction was changed to "Excusable delay not caused by contractor." The committee approved the instruction as revised.

f. *CV2228. Compensable delay; contractor's claim for time and money*. The committee revised the instruction to read:

> [Name of contractor] claims [he] was entitled to additional time and money to perform the work. To succeed on this claim, [name of contractor] must prove that the events causing the delay:
>
> (1) were caused by [name of owner] and not [name of contractor];
>
> (2) were within [name of owner]'s control;
>
> (3) were reasonably foreseeable by [name of owner];
>
> (4) required [name of contractor] to incur additional expenses and take additional time in performing the work.

Former subparagraph (4) (regarding assumption or waiver of the delay) was deleted. Mr. Scott noted that there can be three types of delay: (1) excusable delay, where neither the contractor nor the owner is at fault, in which case the contractor is entitled to additional time; (2) compensable delay, where the owner is at fault but the contractor is not, in which case the contractor is entitled to additional time and money; and (3) inexcusable delay, where the contractor is at fault, in which case the contractor is not entitled to either additional time or additional money. Mr. Humpherys noted that CV2226 imposes less requirements to obtain additional time than CV2228 does and asked which would apply if the contractor just wanted additional money and not additional time. He suggested that CV2228 should deal only with additional money, not additional time, which is covered by CV2226. Dr. Di Paolo, however, thought that they were not mutually exclusive. The contractor, for example, may be entitled to more money under CV2228, but any damage award could be offset by liquidated

damages if the contractor were not also given more time to complete the contract. The committee changed the title of the instruction to "Compensable delay caused by owner." The committee approved the instruction as modified.

e. *CV2227. Inexcusable delay; denying contractor's claim for additional time or money*. At Mr. Scott's suggestion, CV2227 was moved to follow CV2228 on compensable delay. Messrs. Humpherys and West asked whose burden it was to show inexcusable delay, and whether inexcusable delay is just the absence of an excusable or compensable delay. Mr. Humpherys noted that, under CV2228, the burden of proof is on the contractor to prove compensable delay, but under CV2227 the burden of proof is on the owner to prove inexcusable delay and noted the inconsistency. Mr. Scott noted that inexcusable delay may be a direct claim by the owner or an affirmative defense to a contractor's claim for compensable delay. He noted that, in the usual case, the contractor sues the owner for nonpayment, and the owner defends by saying that he didn't pay the contractor because the contractor delayed the project, costing the owner money. In that case, Mr. Shea suggested, the owner only has to show that the contractor has not met his burden of proving an excusable or compensable delay. The committee agreed to delete CV2227.

Mr. Scott will draft a new instruction for an owner's claim for damages caused by a contractor's delay.

g. *CV2234. Termination for cause*. Mr. Young noted that there is no Utah case law on the issue of termination for cause and suggested deleting the instruction. Mr. Carney thought the instruction should be included, with a committee note saying there are no Utah cases on point, but that the instruction represents the majority view from other jurisdictions. Mr. Young thought that the committee was not instructing on matters unless there was Utah law on point. Others pointed out that some of the instructions are rewrites of MUJI 1st instructions, and MUJI 1st did not have Utah authority for every instruction. Mr. Scott noted that CV2234 should not be controversial, that the concept is almost universally recognized. Dr. Di Paolo asked whether "breached the contract" needed to be defined. Mr. Shea noted that CV2101 and CV2102 talk about breaching a contract "by not performing [one's] obligations" under the contract. Others thought that jurors would understand the term. Dr. Di Paolo also thought "cure the breach" in subparagraph (2) would be unclear to jurors. The committee changed subparagraph (2) to read: "(2) gave [name of other party] reasonable time to correct the breach [as required by the contract]." The last phrase was bracketed to show that it is optional, since some contracts may not explicitly deal with time to correct a breach. The committee approved the instruction as modified.

h. *CV2215. Damages for contractor's defective work.* Mr. Young distributed a memorandum and drafts of CV2215 and CV2214 ("Contractor's liability for defective work") that he had drafted. Mr. Young noted that the measure of damages for defective work is generally the reasonable cost of repair but that sometimes repairs are not economically practicable. This concept is subsumed in the phrase "unreasonable economic waste," which is well established in the case law but not well defined and would be confusing to jurors.

Mr. Young will revise CV2215 to add a definition of "unreasonable economic waste," based on the Restatement.

2. *Remaining Construction Contract Instructions.* Mr. Scott encouraged the committee to provide any feedback on the outstanding instructions before the next meeting so that he can present the committee with concise, simplified instructions at the next meeting.

3. *Next Meeting.* The next committee meeting will be Monday, October 13, 2009.

The meeting concluded at 6:05 p.m.